83-213

No. 83-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., et al.,

—and—

PATRICIA PARISI, et al.,

Petitioners,

—v.—

HUGH L. CAREY, individually and as Governor of the State of New York, et al.,

Respondents.

UNITED STATES OF AMERICA,

Amicus Curiae

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the decision of the Court of Appeals for the Second Circuit is in conflict with the controlling prior decisions of this Court, particularly United States v. Swift & Co., 286 U.S. 106 (1932), in that it permits defendant State officials to modify a final consent judgment upon an unclear standard of "especially great generosity" and opens the door to endless litigation of mental retardation and other complex matters?

2. Whether the decision of the Court of Appeals for the Second Circuit applies this Court's decision in Youngberg v. Romeo, ___ U.S. ___, 73 L. Ed. 2d 28 (1982), in such a way as to depart from the usual and accepted course of judicial proceedings, in that it improperly

restricts the fact-finding and remedial authority of the district courts and requires them uncritically to acquiesce in the clinical and non-clinical views of defendant State officials at all stages of litigation?

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS FOR THE
SECOND CIRCUIT

Petitioners, members of the plaintiff-appellee class below,* respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on March 31, 1983.

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* The parties to the proceedings below, in addition to those named in the caption, included the following named plaintiffs-appellees: Benevolent Society for Retarded Children, Willowbrook Chapter of the New York State Association for Retarded Children; Lara R. Schneps, by her father Murray B. Schneps; Nina Galin, by her mother Diana Lane McCourt; Anthony Rios, by his father Jesus Rios; David Amoroso, by his mother Rosalie Amoroso; Rose Evelyn Cruz, by her father Francisco M. Cruz; Barry Friedman, by his father Melvin Friedman; Lowell Scott Isaacs, by his father Jerome W. Isaacs; Antoinette Magri, by her mother Sandra Magri; Anselmo Clarke, by his mother Estella Clarke; Nelson Agosto, by his aunt and next friend Lucilia DeJesus; Frances Breen, by his sister Mary Morganstern as committee of her person and property; John Duffy, by his next friend Robert L. Feldt, Esq.; Evelyn Cruz, by her father Francisco Cruz; Bonnie Rose, by her mother Anne

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OPINIONS BELOW

The opinion of the Court of Appeals dated March 31, 1983 (No. 82-7741, 82-7591), is reported at 706 F.2d 956, and the opinion and order of the District Court which it in part reverses, dated April 28, 1982, is reported at 551 F. Supp. 1165. Copies are included in the appendix to this petition.

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Rose; Mario Narvaez, by his mother Carmen Narvaez; John Doe, by his mother Jane Doe; and Steven Rosepka, by his father Ben Rosepka. (Patricia Parisi sues through her mother Lena Stevernagel.) Additional defendants-appellants below included Zygmond L. Slezak, Commissioner, New York State Office of Mental Retardation and Developmental Disabilities; Thomas Shirtz, Deputy Commissioner, OMRDD; and Ella A. Curry, Director, Frances Ryan, Deputy Director, Clinical Services, and James Walsh, Deputy Director, Institutional Administration, Staten Island Developmental Center (Willowbrook). NYSARC, Inc., the only corporation, has no parent companies, subsidiaries or affiliates.

JURISDICTION

As noted above, the opinion and judgment sought to be reviewed was filed in the Court of Appeals on March 31, 1983. A petition for rehearing and for en banc reconsideration was timely filed in accordance with F.R. App. P. 35 and 40, and was denied on May 9, 1983. A copy of this denial is included in Appendix B to this petition. This petition for a writ of certiorari is filed within the 90 days authorized in 28 U.S.C. 2102(c). Sup. Ct. R. 20.2. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . . U.S. Const., Amend. 14, § 1.

STATEMENT OF THE CASE

This is one of the most important lawsuits ever brought on behalf of

mentally retarded individuals. It was instituted in 1972 under 42 U.S.C. 1983* on behalf of the 5,200 mentally retarded residents then at the Willowbrook State School, a public institution for the mentally retarded on Staten Island, New York, and against the New York State officials responsible for the deplorable conditions that existed there. On April 30, 1975, the District Court approved a detailed and painstakingly negotiated Consent Judgment. New York State Association for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975). Of primary importance was the requirement that Willowbrook be reduced to no more

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* The District Court had jurisdiction over this civil rights case pursuant to, inter alia, 28 U.S.C. 1331 and 1343(3) and (4). See Final Judgment on Consent, April 30, 1975 ("the Consent Judgment"), at ¶ 1. Appendix D to this Petition at D-2.

than 250 beds by April 30, 1981, by means of relocating residents into "community placements," defined as non-institutional residences of no more than ten beds for all but the most capable adult clients. Consent Judgment, Section V(4) at D-5.* By this provision,** the framers of the Consent Judgment sought not simply to free plaintiff class members from the

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* Respondent-defendants reaffirmed their commitment to community placement (as so defined) in subsequent consent orders issued on March 10, 1977 (resolving a contempt motion alleging widespread noncompliance with the original judgment) and again on September 15, 1978. Later, the parties agreed that for the severely retarded and multiply handicapped class members housed in the Flower Hospital in Manhattan, even smaller placements, of between three and six beds, were appropriate. Order of October 22, 1979 ("the Flower order"). Appendix E to this petition.

** The full definition of a community placement was

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horrors of Willowbrook, but also to ensure that they would not be shunted to other institutional settings where the conditions which led to Willowbrook would inexorably be duplicated.

This case is now before this Court because of a decision by the Court of Appeals for the Second Circuit which threatens to undo the Consent Judgment's effort to eradicate the evils of Willowbrook simply because the state has changed its mind. The decision could end the search for settlement in complex cases, creating instead a situation where no

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> a non-institutional residence in the community in a hotel, halfway house, group home, foster care home, or similar residential facility of fifteen or fewer beds for mildly retarded adults, and ten or fewer beds for all others, coupled with a program element adequate to meet the resident's individual needs.

Consent Judgment, Section V(4) at D-5.

judgment is ever really final. Further, by its misapprehension of this Court's holding in Youngberg v. Romeo, ___ U.S. ___, 73 L.Ed. 2d 28 (1982), the Court of Appeals decision would require district courts to rubber stamp any opinion expressed by State officials at every stage of mental retardation and perhaps other types of cases.

The District Court's Decision

In May, 1981, petitioners moved in the District Court to hold respondents in noncompliance with every major provision of the Consent Judgment. At the same time, respondents sought to modify the above mentioned community placement provisions so as to allow placement of class members into 50-bed institutions -- precisely the opposite of the relief guaranteed by the Judgment. After a 25-day trial, the District Court held,

Opinion and Order of April 28, 1982 ("D.C. Opinion") Appendix C to this Petition at C-15 - C-48, and the Court of Appeals affirmed, Opinion of March 31, 1983 ("C.A. Opinion") Appendix A to this Petition at A-12 - A-14, that class members in Willowbrook and other institutions were still being subjected to filthy and unsanitary conditions, deprived of proper clothing and staff protection, and provided with little, if any, habilitative programming.* Significantly, the trial court found these same deficiencies in the existing 50-bed institutions (either established prior

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* On the basis of these findings, the District Court also decided to appoint a Special Master to monitor respondents' future performance, D.C. Opinion at C-48 - C-64, and the Court of Appeals again affirmed. C.A. Opinion at A-14 - A-20. Petitioners do not seek review of these holdings, except insofar as the Court of Appeals indicated that its interpretation of Youngberg v. Romeo, supra, would apply to future activities of the master. C.A. Opinion at A-20.

to the Consent Judgment or housing only non-class members) which respondents put forth as prototypes of what they now had in mind for class members. D.C. Opinion at C-19 - C-20, C-23 - C-24, C-26 - C-27, C-34 - C-35, C-37, C-81 - C-84 ("most of these facilities fail, in important respects, to provide class members with the most basic services mandated by the Consent Judgment").

With regard to respondents' motion to modify the definition of community placement and related provisions of the Consent Judgment,* the District

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* Respondents also sought modification of provisions allowing them until April 30, 1981, to reduce Willowbrook to a facility of 250 beds or less and imposing associated planning requirements, Consent Judgment, Section V(1) at D-5, as well as relief from the three to six-bed limitation for the 100-plus class members covered by the Flower order. The District Court amended the latter order to permit placement of the Flower clients into community facilities of four to six beds. D.C. Opinion at C-115, C-116.

Court did extend the period in which community placement could be effected but declined to obliterate the requirement of community placement. Id. at C-95 - C-96, C-116.

The District Court based its denial of further community placement modifications on two separate and independent factual grounds, only one of which implicated questions of professional or clinical judgment regarding appropriate habilitation of mentally retarded individuals. First, the trial court found, on the basis of expert testimony, that facility size was an important factor in the effectiveness of community programs.

The second leg of the trial court's reasoning involved no weighing of clinical or medical judgments, but was based solely on observable, objectively measurable facts demonstrating that respondents' asserted difficulties in

making community placements under the agreed-upon definition were either exaggerated or caused by their own actions or failures to act. Id. at C-96 - C-107. Thus, for example, respondents argued they could not find sufficient small homes into which they could place residents. The District Court found, based on respondent's deposition testimony, that, at most, it was difficult to find sites for a small number of class members in only two Boroughs (Manhattan and Bronx). The court further found that respondents had exacerbated the housing problems by their own practices, including reducing the number of people looking for sites and the type of site being sought. The District Court thus declined to alter its fundamental community placement requirements until respondents had

made a reasonable effort to comply with them. Id. at C-103, C-106.

The Court Of Appeals' Decision

The Court of Appeals' decision of March 31, 1983, while generally affirming the trial judge's findings of noncompliance, reversed and remanded for further proceedings on respondents' motion to modify. Though not holding any of the District Court's findings to be clearly erroneous, Fed. R. Civ. P. 52(a), the Court of Appeals, in its discussion of the modification motion, nevertheless adopted respondents' view of the above factual issues, both clinical and non-clinical, holding that this Court's decision in Youngberg v. Romeo, supra, required unquestioning acceptance of all State opinions. C.A. Opinion at A-34 - A-35. It also assumed that the

primary purpose of the Willowbrook litigation was simply to empty the institution, and relegated to secondary importance petitioners' vital concern that class members not be transferred to other, albeit smaller, versions of Willowbrook. Id. at A-29.

With this foundation of appellate fact-finding, the Court of Appeals concluded that the trial judge had applied an erroneous legal standard for modification of a final consent judgment under F. R. Civ. P. 60(b)(5). In evaluating respondents' motion to allow "community placements" of up to 50 beds, the trial court had applied the standard enunciated by this Court in United States v. Swift & Co., 286 U.S. 106 (1932), requiring "a clear showing of grievous wrong evoked by new and unforeseen conditions." Id. at 119; D.C. Opinion at C-107 - C-111. This standard, said the

Court of Appeals, was inappropriate for "institutional reform" cases such as Willowbrook; rather, it said, in such cases motions for modification should be granted with "especially great generosity." C.A. Opinion at A-30 - A-34. The new substantive standard for modification of judgments was not further articulated; rather, the Court of Appeals' opinion simply proceeded to apply its new, unstated test to evidence weighed in the light of the deference to professional judgment supposedly mandated by Youngberg v. Romeo, supra -- deference which, under its interpretation, was tantamount to surrender. C.A. Opinion at A-34 - A-35.

Petitioners now seek review of the Court of Appeals' abandonment of the 50-year-old Swift standard, its substitution therefor of an unclear standard of "especially great generosity," and its

reading of Youngberg as to usurp the fact-finding and remedial functions of the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS HAS PLACED ITSELF IN CONFLICT WITH CONTROLLING PRIOR PRECEDENTS

A. The Court Below Has Disregarded the Holding of This Court in United States v. Swift & Co. and Its Progeny.

The standard for modification of a final consent judgment at the behest of a defendant was set forth by this Court in United States v. Swift & Co., supra, an antitrust case settled by a consent decree between the Federal government and five major meatpacking companies. On review of a modification approved below, this Court held:

> There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or

> wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes. . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.

Id. at 119 (emphasis supplied).

No lesser standard emerged from United States v. United Shoe Corp., 391 U.S. 244 (1968), in which -- contrary to the situation in Swift and in the instant case -- it was the original plaintiff, the Federal government, that was seeking a modification of a long-standing antitrust decree. When the decree had been obtained with a specific result in mind and where

"time and experience" had shown that the result was not forthcoming, this Court held in United Shoe that the prevailing plaintiff might be entitled to further relief by way of modification; but where "the defendants sought relief not to achieve the purposes of the provisions of the decree, but to escape their impact," modification would not be warranted. Id. at 249. In such a case, the strict standard of Swift remained unchanged:

> Swift teaches that a decree may be changed upon an appropriate showing and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved.

Id. at 248 (emphasis in original). See also Columbia Artists Management Inc. v. United States, 381 U.S. 348, 352 (1965) (opinion dissenting from summary disposition); Ackermann v. United States, 340

U.S. 193, 198 (1950) (party cannot be relieved from a judgment even where "hindsight seems to indicate to [it] that [its] decision was probably wrong"); Chrysler Corp. v. United States, 316 U.S. 556 (1942).

The Eighth Circuit, in 1969, aptly summarized the teachings of Swift and its progeny:

> We glean, from this, certain factors of importance: (1) that, where modification and amendment of an existing decree is under consideration, there are "limits of inquiry" for the decree court and for the reviewing court; (2) that the inquiry is "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow"; (3) that the movants must be "suffering hardship so extreme and unexpected" as to be regarded as "victims of oppression"; and (4) that there must be "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions." Placed in other words, this means for us that modification is only cautiously to be granted; that the dangers which the decree was meant to foreclose must almost have disappeared; that hardship

> and oppression, extreme and unexpected, are significant; and that the movants' task is to provide close to an unanswerable case. To repeat: caution, substantial change, unforeseenness, oppressive hardship, and a clear showing are the requirements.

Humble Oil & Refining Co. v. American Oil Co., 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), cert. denied, 395 U.S. 905 (1969).*

The Court of Appeals sought to distinguish the Willowbrook case from these precedents on the theory that even though the modification here was sought by respondent-defendants, "it is not, as in Swift, in derogation of the

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* See also Nelson v. Collins, 700 F.2d 145 (4th Cir. 1983); Roberts v. St. Regis Paper Co., 653 F.2d 166, 174 (5th Cir. 1981); Holiday Inns, Inc. v. Holiday Inn, 645 F.2d 239, 240 (4th Cir.), cert. denied 454 U.S. 1053 (1981); United States v. Work Wear Corp., 602 F.2d 110, 113 n.6 (6th Cir. 1979); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3rd Cir. 1977).

primary objective of the decree, namely, to empty such a mammoth institution as Willowbrook." C.A. Opinion at A-29. As noted above, this reasoning is incorrect. But as the Court of Appeals' decision ultimately makes clear, the lower court was not truly seeking to harmonize the outcome here with the strict holding of Swift, but rather was setting an entirely new modification standard for use in mental retardation and other litigation. Because of certain scholarly articles which it read as advocating a much less stringent standard in "institutional reform" cases, C.A. Opinion at A-30, and because of the "change in law" said to result from Youngberg v. Romeo, id. at A-33,* the Court of Appeals held that

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* The type of "precedential evolution" represented by Youngberg, without more, does not justify relief under F.R. Civ. P. 60(b) (5). Mayberry v. (Continued)

respondents' motion in this case should be tested by an open-ended measure which was never clearly defined but which somehow meant, in this case at least, that Youngberg, not Swift, should apply. Id. at A-33 - A-35.* But surely, an evidentiary presumption employed in liability determinations cannot also serve as a substantive standard for post-judgment proceedings and modifications. Such a shocking departure from precedent, with such fateful consequences for the judicial system, ought to be considered by this Court at the earliest possible occasion. Sup. Ct. R. 17.1(c).

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Maroney, supra at 1164; cf. In re Master Key Antitrust Litigation, 76 F.R.D. 460, 465 (D. Conn. 1977), aff'd 580 F.2d 1045 (2nd Cir. 1978)

* The Court of Appeals' version of Youngberg, moreover, bore little resemblance to what this Court actually held (see infra).

B. The Court of Appeals Decision Will Lead to Unnecessary and Protracted Litigation.

The Court of Appeals held, as noted above, that defendants' motions to modify final consent judgments should be generously granted. Without further defining the standard for modification, the court then held, pursuant to its erroneous reading of Youngberg v. Romeo, that views expressed by state defendants and their witnesses must be uncritically accepted by the district courts. This unlikely combination of standards will inevitably require the district courts, in this and other cases, to grant every defense motion for modification which some "professional" is willing to support. Such a procedure improperly robs final judgments of dignity or validity. See Wallace Clark & Co., Inc. v. Acheson Industries, Inc., 532 F.2d 846, 849 (2d

Cir.), cert. denied, 425 U.S. 976 (1976).

If allowed to stand, the Court of Appeals decision will lead to an endless tide of relitigation of matters long thought to be settled, on the part of State officials who have not met their obligations and now find it easier to change their "judgments" instead. Although it seemingly applies to any final judgment, entered on consent or otherwise, C.A. Opinion at A-27, the Willowbrook holding will especially discourage settlement of complex and time-consuming cases, and will force plaintiffs to go to trial in all such matters.* Plaintiffs will have absolutely no incentive to enter meaningful

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* Consent judgments have proved useful in resolving many complicated challenges to institutional practices and conditions.

negotiations toward a consent decree, because State officials will remain free to seek modification as though no order had ever been issued; conversely, the concessions often made by plaintiffs, such as waiving a formal adjudication of their rights or a finding that these rights have been violated, will no longer be responsible.

This Court, as the overseer of a heavily taxed Federal judiciary, cannot but realize that the Court of Appeals' importation of the Youngberg v. Romeo standard into every stage of litigation will call into question the validity of all final injunctive orders, entered in a wide range of cases -- past, present, or future.* The Willowbrook decision

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* More recently, the Court of Appeals gave renewed evidence of its determination to break new ground in (Continued)

is an open invitation to public officials to seek relief from their own commitments

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(Continued)

> dramatically facilitating modification of final consent judgments. In ruling on (and affirming) a routine District Court order enforcing a stipulation regarding discipline at a New York State juvenile institution, the Court of Appeals gratuitously invited State officials to seek modifications of the stipulation under the lenient Willowbrook standard:
>
> > . . . we affirm Judge Motley but without prejudice to [defendants'] moving for . . . modification in the district court. . . . In considering a motion for modification, the district court should be guided by our recent decision in New York State Association for Retarded Children, Inc. v. Carey, and take into account all of the circumstances relating to the appropriateness of continuing this court ordered stipulation.
>
> Pena v. New York State Division for Youth, No. 82-7876 (2nd Cir., May 25, 1983), slip op. at 6. Petitioners are aware of nothing in the recent decisions of this Court or any other legal development which explains the Circuit's apparent antipathy toward good faith agreements negotiated in cases involving the State.

or judicial commands, under a standard which gives no weight to past adjudications. The Court of Appeals' decision thus stands the law of modification on its head.

II.

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY IMPROPERLY RESTRICTING THE POWER AND AUTHORITY OF THE DISTRICT COURTS.

The Court of Appeals focused upon that portion of Youngberg which defines the district courts' scope of inquiry in determining the initial liability of State officials:*

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* It goes without saying that if the Court of Appeals were correct that Youngberg v. Romeo nonetheless applied to part or all of this case, it should not have attempted to apply that test to the record of a 25-day trial, C.A. Opinion at A-8, but

(continued)

> In determining what is "reasonable" -- in this and in any case presenting a claim for training by a state -- we emphasize that courts must show deference to the judgment exercised by a qualified professional . . . the decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standard as to demonstrate that the person responsible actually did not base the decision on such a judgment.

73 L.Ed. 2d at 41-42. It then adopted this cautionary language as the standard for defendant-initiated modifications in this and perhaps other types of litigation.

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> should have remanded such a complex matter for introduction of evidence addressed to the new legal standard and for plenary reconsideration by the court most familiar with the facts and background of the case. E.g., Daniel v. Goliday, 398 U.S. 73 (1970) (effect of subsequent decisional law "should be determined in the first instance by the District Court on a record developed by the parties with specific attention to the issue").

Moreover, as Youngberg was applied to the Willowbrook modifications, by the Court of Appeals decision, there was little for the District Court to do but endorse the views of respondents and their experts, both as to how the Consent Judgment ought to be interpreted and how its community placement provisions ought to be modified. C.A. Opinion, at A-18 - A-20, A-33 - A-35. The court's focus on the testimony of only respondents' witnesses, its suggestion that bad faith need be shown in order to impugn this testimony, and the narrow scope of its remand to the District Court all suggest that the trial judge must inevitably accede to the views of respondents and their experts. C.A. Opinion at A-33 - A-35.

Petitioners submit that such a disposition ousts the District Court from its primary function of finding facts

and fashioning appropriate injunctive relief, and elevates Youngberg's initial deference to professional judgment into an all but irrebuttable presumption that the State is always right. We do not believe this Court so intended to establish State officials and their witnesses as the ultimate arbiters of constitutional values.

A. District Courts Must Remain Free To Determine Facts and Devise Appropriate Remedies.

Even if Youngberg v. Romeo is the standard to be applied to respondents' motion for modification, petitioners cannot agree that this Court's ruling was intended to deprive district courts in this and other cases of their functions to weigh testimony and evidence, assess the credibility of witnesses, and determine the facts of a case in fashioning remedies. The Youngberg decision, after

all, creates only a presumption in favor of State officials' professional views, and then in their specific areas of competence. The facts bearing on remedy (or modification thereof) must still be found by the trial judge, not dictated by respondents and their experts.

And it is not, as the Court of Appeals seems to assume, a matter of counting the number of professionals who testified for the State and noting the absence of allegations of bad faith. C.A. Opinion at A-23 - A-24, A-34. To begin with, as an examination of the voluminous trial record will indicate, the views of both petitioners' and respondents' witnesses were considerably more complex than rigid insistence on ten and 50-bed limits respectively, See D.C. Opinion at C-66 - C-78. Their testimony needs to be carefully weighed by the

District Court*, and reconciled with other evidence to the extent possible, in order to determine what is an accepted professional judgment -- if that is to be the standard.

Moreover, expert testimony on behalf of State officials or anyone else ought still be subject to judicial scrutiny and to being disbelieved or discounted in appropriate instances. In this case, the District Court should be free to weigh the qualifications of respondents' experts (e.g., the fact that Dr. Shervert Frazier had had virtually no

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* As the Tenth Circuit has held, citing Youngberg v. Romeo, what is required in these cases, even at the liability stage, is "a balancing process" between the asserted needs and interests of the institution and its residents. Milonas v. Williams, 691 F.2d 931, 942 (10th Cir. 1982), cert. denied 103 S. Ct. 1524 (1983). Such balancing is a proper function of the trial judge under normal fact-finding procedures.

experience with retarded people, T. 4755-4778, 5747-5748); their motives in testifying as they did (e.g., Barbara Blum had placed her own child in the 50-bed facility she described, T. 4050, 4102, and might have been less than objective in evaluating its suitability); their reliability (e.g., Dr. Philip Ziring assessed the medical needs of the Flower Hospital clients despite an admitted lack of familiarity with them, T. 2490, and in the face of petitioners' direct observational and documentary evidence which proved him wrong, D.C. Opinion at C-88, C-112 - C-113); and, of course, the witnesses' demeanor and their performance on cross-examination. Moreover, State officials' judgments which are found to be qualified by budgetary pressures, organizational loyalties, and personal career perspectives ought not to be entitled to

the respect which Youngberg accords the "untrammeled" clinical determinations of on-the-scene professionals. Society for Good Will to Retarded Children v. Carey, No. 78-Civ.-1847 (E.D.N.Y., February 24, 1983), slip op. at 4-5.

Whether or not the Court of Appeals considered that the District Court made these types of credibility judgments in reaching its decision, the narrowness of its remand seems to rule them out in future proceedings in this and other cases. Such a directive is not only an affront to the respected and experienced District Judge who has grappled with this difficult case for seven years, but it also diminishes and demeans the role of all district courts in cases where Youngberg is held to apply. This Court must therefore intervene to correct this unwarranted

departure from the accepted and usual course of judicial proceedings. Sup. Ct. R. 17.1(a).

B. Deference to Professional Judgment Must Be Limited to Areas of Clinical Expertise.

It is one thing to say, as this Court has in Youngberg, supra, 73 L. Ed. 2d at 41-42, that trial courts should defer to specific medical and clinical decisions made by State officials. It is quite another thing, which this Court has never done, to require district courts to accept any assertion made by such officials and their experts whether or not it is an exercise of medical or clinical judgment.

As noted above, the District Court's decision to grant only limited relief on respondents' motion to modify rested on two separate legs. Only the first, relating to the effect of size on the benefits of community placement, is

even arguably subject to Youngberg's professional judgment standard. The second, equally supportive, leg of the trial court's reasoning -- relating to the actual difficulty of locating small community sites and respondents' contributions to their own problems -- involves simple matters of fact to which the Youngberg standard has no possible application. There is no element of clinical or medical judgment involved in factually determining the state of the housing market, categorizing the ways in which the State arbitrarily and admittedly limited the pool of available residential sites, assessing the impact of so-called "community opposition," and objectively noting respondents' obvious failure to seek out all possible sources of funds for community programs. D.C. Opinion at C-96 - C-107. The Court of Appeals decision improperly treats all such

factual questions as matters of clinical or medical opinion into which the District Court should not intrude, when in fact they are complicated but traditional matters of fact which district courts routinely decide.

The ruling below also wholly ignores the possibility that a professional judgment, otherwise valid, may not be entitled to judicial deference if it is shown to be based upon an erroneous factual predicate. Respondents' experts may have said that in view of the unavailability of suitable small facilities, the prevalence of community opposition, and the medical needs of some clients, placement of Willowbrook class members in 50-bed residences was an appropriate professional choice. But if the evidence in the record convinced the trial court, as it did, that small facilities were not necessarily unavailable, D.C. Opinion at

C-96 - C-107, that community opposition was not a significant problem, D.C. Opinion at C-94 - C-95, and that the severe medical needs, upon factual examination, did not actually exist, D.C. Opinion at C-86 - C90, then the presumption which might otherwise be accorded these professional judgments ought no longer to apply.

Surely, objectively ascertainable facts such as those described above cannot be swept up in the rubric of "professional judgment," to which trial courts are bound to defer; if such deference is not confined to the type of clinical matters that this Court plainly intended, then district courts will be reduced to mere figureheads while State officials dictate what the Constitution will allow. Petitioners do not believe this Court can countenance such a misinterpretation of its holding in Youngberg.

CONCLUSION

The Court of Appeals' decision in this case drastically conflicts with 50 years of jurisprudence since this Court's ruling in United States v. Swift & Co., supra, and it misapplies this Court's holding in Youngberg v. Romeo, supra, so as to make it an "instrument of wrong" (in the words of Swift, at 115) and a distortion of the judicial process. Petitioners therefore ask this Court to grant a writ of certiorari in

order to decide the important questions presented by the decision below.

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Respectfully submitted,

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